Bee Hock Sdn Bhd v Yuwang Sdn Bhd & Ors

HIGH COURT (TAWAU) — CIVIL SUIT NO T 22–04 OF 2011
CHEW SOO HO J
21 JANUARY 2013

Evidence — Material evidence — Withholding and suppression of — Whether defendants wilfully withheld or suppressed material evidence — Evidence Act 1950 s 114(g)

Moneylenders — Loan — Loan on secutiry — Fraudulent moneylending — Whether first defendant licensed moneylender — Failure to repay loans — Whether loan transactions led to transfer of title to property tainted with illegality or fraud — Whether loan agreements null and void — Whether first defendant failed to enforce security as stipulated in reg 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 — Moneylenders Ordinance

The plaintiff had entered into two loan agreements, namely a loan agreement and a supplemental loan agreement, with the first defendant a licensed moneylender for the loan of RM1,124,000 and RM240,500 respectively with interest at the rate of 1.25% per month. In order to secure these loans the plaintiff had pledged its title to a double storey shop house situated in Tawau, Sabah ('the property') as security together with a memorandum of transfer (MOT) signed in escrow in favour of the first defendant. The plaintiff's two directors had also provided letters of guarantee to guarantee repayment of the loans. The plaintiff had intended to settle the loans by obtaining an overdraft facility and term loan from the bank. However, when the bank declined to grant credit facilities to the plaintiff, the latter sought a four month extension from the first defendant to settle the total loan sum of RM1,630,500. The first defendant proceeded to transfer the property into its name on the grounds that the plaintiff was unable to repay the loan sum. The property was subsequently sold by the first defendant to the third defendant through a bank loan granted by the fourth defendant to the third defendant. The title of the property was consequently charged to the fourth defendant. The plaintiff filed the instant action against the defendants alleging illegal and/or fraudulent moneylending by the first defendant. It was the plaintiff's case that the loan agreements leading to the transfer of the title of the property to the first defendant were tainted with illegality or fraud or breach of contract. The principal contentions raised by the plaintiff on the issue of illegality were basically on the breach of the Moneylenders Ordinance and/or the Moneylenders Act 1951 ('the Act').

Consequently the plaintiff prayed for the charge created by the third defendant in favour of the fourth defendant to be set aside.

Held, dismissing the plaintiff's claim against the defendants with costs of RM15,000 to the first and second defendants and RM10,000 to the fourth defendant:

(1) It was a fact that at the time of the loan transactions, the Act had not been extended to Sabah and that the operative law to govern the loans granted by the first defendant to the plaintiff was the Moneylenders Ordinance ('the Ordinance'). From the facts of the present case, there was no dispute that the first defendant was not licensed as a moneylender as provided in the Ordinance. However, if the plaintiff alleged a breach, it had the burden to prove by calling the issuing authority. Ex facie, the court had to accept the licence as valid unless proved otherwise. As for the interest charged, there was no infringement of the Ordinance relating to the interest rate (see para 13).

(2) Although the plaintiff had referred to s 8(1) of the Ordinance to contend that the first defendant had failed to produce the register to prove the loans, it had not served a notice to require the first defendant or its general manager (the second defendant) to produce the said register. If the second defendant had been served with such a notice and had failed to produce the same without valid ground, then it could be said that the defendants had wilfully withheld or suppressed material evidence under s 114(g) of the Evidence Act 1950. On the evidence as a whole, the loan agreements had not contravened the Ordinance to be construed as being illegal (see para 16).

(3) The plaintiff having signed the loan agreements and having agreed to hand in the original title of the property coupled with the MOT duly executed in escrow in favour of the first defendant as security for the loans, knew that the property would be forfeited if it failed to repay the loans and interest as covenanted. It was also clear that the first defendant had only exercised its right to transfer the property to its name, when the plaintiff could not repay the loan. Thus, from the facts and evidence, there was no evidence of any dishonesty or deceit on the part of the first defendant to deprive the plaintiff wilfully of its property to constitute fraud as alleged. In any case the plaintiff's allegation of fraud in the loan transactions was inconsistent with its conduct in seeking indulgence from the first defendant to extend the time for repayment of the loan and was indeed an afterthought (see paras 17–23).

(4) Further, the first defendant was not contractually required to issue a notice to the plaintiff to remedy any breach or default of the loan agreements. In the circumstances there was no fraud or any breach of the

loan contracts when the first defendant did not issue any written notice to the plaintiff to remedy the default in repayment of the loans (see para 121).

(5) The plaintiff's contention that the first defendant had failed to enforce the security under O 83 of the RHC as stipulated in reg 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 (the Regulations) was without merit. It is an undeniable fact that the prescribed moneylending agreement in Schedule K cl 5(4)(a) of the Regulations did not exist when the parties herein executed the loan agreements. They had not signed on such prescribed agreement nor agreed to such prescribed term as to enforce the immovable security as a charge action under O 83 of the RHC. Consequently, any failure to comply with O 83 of the RHC in the instant case neither affected the validity of the loan agreements nor the transfer of the security arising from the failure of the plaintiff to repay the loans as contractually agreed and covenanted vide the loan agreements (see para 130).

(6) Although the third defendant was absent throughout the trial, he could not be deemed to have accepted the existence of fraud. This was because the plaintiff had failed to prove fraud or collusion or the like between the first defendant and/or the second defendant and the third defendant and the fourth defendant, which were closely knitted. Thus, the plaintiff's case against the third defendant was also dismissed but with no order as to costs since the latter had not appeared to defend himself (see para 134).

[Bahasa Malaysia summary

Plaintif telah memeterai dua perjanjian pinjaman, iaitu perjanjian pinjaman dan perjanjian pinjaman tambahan, dengan defendan pertama pemberi pinjam berlesen untuk pinjaman sebanyak RM1,124,000 dan RM240,500 masing-masing dengan faedah pada kadar 1.25% sebulan. Untuk menjamin pinjaman-pinjaman ini plaintif telah memajak gadai hak miliknya kepada rumah kedai dua tingkat terletak di Tawau, Sabah ('harta tersebut') sebagai jaminan bersama dengan memorandum pindah milik (MP) yang ditandatangani dalam eskrow bagi pihak defendan pertama. Kedua-dua pengarah plaintif telah mengemukakan surat-surat jaminan untuk menjamin pembayaran semula pinjaman-pinjaman. Plaintif telah pun menyelesaikan pinjaman-pinjaman dengan memperoleh kemudahan overdraf dan pinjaman bertempoh daripada bank. Walau bagaimanapun, apabila bank menolak untuk memberikan kemudahan kredit kepada plaintif, plaintif memohon lanjutan selama empat bulan daripada defendan pertama untuk menyelesaikan amaun pinjaman berjumlah RM1,630,500. Defendan pertama meneruskan untuk memindah milik harta kepada namanya atas dasar bahawa plaintif tidak dapat membayar semula amaun pinjaman. Harta tersebut kemudiannya dijual oleh defendan pertama kepada defendan ketiga melalui pinjaman bank yang diberikan oleh defendan keempat kepada defendan ketiga. Hak milik harta

tersebut selanjutnya dicagarkan kepada defendan keempat. Plaintif telah memfailkan tindakan ini terhadap defendan-defendan yang mendakwa pinjaman wang tidak sah dan/atau fraud oleh defendan pertama. Kes plaintif adalah bahawa perjanjian-perjanjian pinjaman yang membawa kepada pindah milik hak milik harta kepada defendan pertama tercemar dengan ketidaksahan atau fraud atau kemungkiran kontrak. Hujahan-hujahan utama yang dibangkitkan oleh plaintif atas dasarnya ketidaksahan adalah pada dasar percanggahan Ordinan Pemberipinjam Wang dan/atau Akta Pemberipinjam 1951 ('Akta tersebut'). Selanjutnya plaintif memohon untuk cagaran yang dibuat oleh defendan ketiga bagi pihak defendan keempat untuk diketepikan.

Diputuskan, menolak tuntutan plaintif terhadap defendan-defendan dengan kos RM15,000 kepada defendan pertama dan kedua dan RM10,000 kepada defendan keempat:

(1) Adalah fakta bahawa pada masa transaksi pinjaman, Akta tersebut tidak dilanjutkan kepada Sabah dan bahawa undang-undang operatif untuk memantau pinjaman-pinjaman yang diberikan oleh defendan pertama kepada plaintif adalah Ordinan Pemberipinjam ('Ordinan tersebut'). Daripada fakta-fakta kes ini, tiada pertikaian bahawa defendan pertama tidak memiliki lesen sebagai pemberipinjam seperti yang diperuntukkan di dalam Ordinan. Walau bagaimanapun, sekiranya plaintif mendakwa percanggahan, ia menanggung beban pembuktian dengan memanggil autoriti yang membuat keluaran. Ex facie, mahkamah telah menerima lesen tersebut sebagai sah melainkan ia dibuktikan sebaliknya. Mengenai faedah yang dikenakan, tidak terdapat percanggahan Ordinan berkenaan dengan kadar faedah (lihat perenggan 13).

(2) Meskipun plaintif telah merujuk kepada s 8(1) Ordinan untuk menghujahkan bahawa defendan pertama telah gagal untuk mengemukakan daftarai untuk membuktikan pinjaman, ia tidak menyampaikan notis yang memerlukan defendan pertama atau pengurus am ('defendan kedua') untuk mengemukakan daftarai itu. Sekiranya defendan kedua telah menyampaikan notis sedemikian dan telah gagal untuk mengemukakan yang sama tanpa dasar yang kukuh, oleh itu ia boleh dikatakan bahawa defendan-defendan telah dengan sengaja menyembunyikan atau menahan keterangan material di bawah s 114(g) Akta Keterangan 1950. Berdasarkan keterangan secara keseluruhan, perjanjian-perjanjian pinjaman tidak bercanggah dengan Ordinan dan ditafsirkan sebagai tidak sah (lihat perenggan 16).

(3) Plaintif dengan menandatangani perjanjian pinjaman dan bersetuju untuk memberikan hak milik asal harta bersama dengan MP yang ditandatangani dalam eskrow bagi pihak defendan pertama sebagai jaminan untuk pinjaman-pinjaman, telah mengetahui bahawa harta tersebut akan dirampas sekiranya ia gagal untuk membayar semula

pinjaman-pinjaman dan faedah seperti yang dijanjikan. Adalah jelas bahawa defendan pertama hanya melaksanakan haknya untuk memindah milik harta kepada namanya, apabila plaintif gagal untuk membuat bayaran semula pinjaman. Justeru, daripada fakta-fakta dan keterangan, tidak terdapat keterangan tentang sebarang ketidakjujuran atau penipuan pada pihak defendan pertama untuk dengan sengaja menafikan plaintif hartanya untuk membentuk fraud seperti yang didakwa. Dalam apa-apa kes, dakwaan plaintif tentang fraud dalam transaksi pinjaman adalah tidak konsisten dengan tindak tanduknya dalam mendapat kepentingan daripada defendan pertama dengan melanjutkan tempoh bayaran semula pinjaman dan ia sememangnya perkara yang difikirkan kemudian (lihat perenggan 17–23).

(4) Tambahan, defendan pertama tidak diperlukan secara kontraktual untuk mengeluarkan notis kepada plaintif untuk meremedi apa-apa kemungkiran atau pelanggaran perjanjian-perjanjian pinjaman. Dalam keadaan-keadaan ini, tidak terdapat fraud atau apa-apa kemungkiran kontrak-kontrak pinjaman apabila defendan pertama tidak mengeluarkan apa-apa notis bertulis kepada plaintif untuk meremedi kegagalan untuk membayar semula pinjaman-pinjaman (lihat perenggan 21).

(5) Hujahan plaintif bahawa defendan pertama telah gagal untuk melaksanakan jaminan di bawah A 83 KMT seperti yang diperuntukkan di dalam Peraturan 10(1) Peraturan-Peraturan Pemberipinjam (Kawalan dan Perlesenan) 2003 (Peraturan-Peraturan tersebut) adalah tanpa merit. Adalah fakta yang tidak dinafikan bahawa perjanjian pinjaman wang di dalam Jadual K C1 5(4)(a) Peraturan tidak wujud apabila pihak-pihak menandatangani perjanjian pinjaman. Mereka tidak menandatangani perjanjian demikian atau bersetuju kepada terma sedemikian yang mana menguat kuasakan jaminan tak alih sebagai tindakan cagaran di bawah A 83 KMT. Selanjutnya, apa-apa kegagalan untuk mematuhi A 83 KMT 1980 dalam kes ini tidak menjejaskan kesahan perjanjian pinjaman mahupun pindah milik jaminan yang timbul daripada kegagalan plaintif untuk membayar semula pinjaman-pinjaman seperti yang dipersetujui secara kontrak dan dijanjikan melalui perjanjian-perjanjian pinjaman (lihat perenggan 30).

(6) Walaupun defendan ketiga tidak hadir sepanjang perbicaraan, dia tidak boleh dianggap sebagai telah menerima kewujudan fraud. Ini adalah kerana plaintif telah gagal untuk membuktikan fraud atau subahat atau yang sama di antara defendan pertama dan/atau defendan kedua dan defendan ketiga dan defendan keempat, yang mana berhubung kait. Justeru, kes plaintif terhadap defendan ketiga juga diketepikan tetapi tanpa perintah tentang kos memandangkan defendan ketiga tidak hadir untuk membela dirinya (lihat perenggan 34).]

Notes

For cases on loan on security, see 10 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 542–555.

Cases referred to

Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personnel representative of the estate of Chan Weng Sun, deceased) [1997] 2 MLJ 45, FC (folld)

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 AMR 329, FC (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356, SC (refd)

Fauziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal [2006] 1 MLJ 505, CA (refd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2010] 1 AMR 501, CA (refd)

Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141; [1996] 3 CLJ 494, CA (refd)

PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd [1980] 2 MLJ 136, FC (refd)

Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering works [1991] 1 MLJ 347, SC (refd)

RHB Bank Bhd v Ya'akob bin Mohd Khalib @ Abdul Ghani bin Muhammed [2008] 1 MLJ 157, CA (refd)

Ranhill Bersekutu Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd [2001] MLJU 3; [2001] 2 CLJ 380, HC (refd)

Sabahbumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 3 MLJ 151, FC (refd)

Siew Kwang Joon & Anor v Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641, HC (refd)

Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated [2004] 2 MLJ 49; [2004] 1 CLJ 889, CA (refd)

Takako Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (not folld)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Contracts Act 1950 ss 2(g), 24(a), 66
Evidence Act 1950 ss 18, 18(3)(a), 114(g)
Interpretation Act 1948 and 1967 s 30(1)
Moneylenders Act 1951 s 10P(2), First Schedule, s 11
Moneylenders (Amendment) Act 2003 s 46(1), (3), (5), (5)(a), (5)(b), (7), (9)

Moneylenders (Control and Licensing) Regulations 2003 reg 10(1), Schedule K
Moneylenders Ordinance (Cap 81) ss 5, 7, 8(1), 11, Second Schedule, r 5
Rules of the High Court 1980 O 83, O 83 r 1

Sugumar Balakrishnan (Sugumar & Co) for the plaintiff.
Liew Hon Min (Liew Hon Min & Co) for the first and second defendants.
Lau Cheung Hoon (Jayasuriya Kah & Co) for the fourth defendant.

Chew Soo Ho J:

BRIEF FACTS

[1] The plaintiff had executed a loan agreement dated 5 October 2007 (bundle B pp 28–39) and a supplemental loan agreement dated 29 October 2007 (B pp 47–50), with the first defendant, a moneylender licensed under the Moneylenders Ordinance Sabah Cap 81 for the loan of RM1,124,000 and RM240,500 respectively with interest chargeable at the rate of 1.25% per month (15%pa). Pursuant to cl 10 of the loan agreement and cl 5 of the supplemental agreement, the plaintiff as borrower had covenanted and agreed to repay the said respective loans within six months from the date of the release of the loans.

[2] As security for the loans and interest thereon the plaintiff had deposited the original title together with a memorandum of transfer in escrow executed in favour of the first defendant in respect of a double storey intermediate terrace shop house erected on land held under TL107503373 situated at TB1111, Jalan Stephen Tan, Central Business District, Tawau Town, Tawau, Sabah ('the said property'). The plaintiff's only two directors, Hong Kim Seng and Shirley Walker also provided joint and several letter of guarantee dated 5 October 2007 (B pp 40–41) and 29 October 2007 (B pp 51–52) to jointly and severally guarantee irrevocably the repayment of the loans to the first defendant.

[3] The first defendant alleged that the loans had been disbursed to the plaintiff and by 20 December 2008, the plaintiff owed the first defendant in the total sum of RM1,630,500 as reflected in the first defendant's statement of account dated 20 December 2008 (B p 100) being the principal sum advanced on 5 October 2007 of RM1,124,000, the second loan advanced on 5 October 2007 of RM240,500 and commission and other expenses of RM266,000 as at 30 November 2008. The plaintiff had signed on this statement of account to confirm and accept the same.

[4] The plaintiff had since 20 March 2008 (B p 33) written to the first defendant seeking four months extension of repayment as the plaintiff was anticipating approval of bank financing in March or April 2008 and in the

meantime, plaintiff would continue to service the interest. However, this bank financing to settle the first defendant's loan was declined by the bank (B pp 34–38 show related correspondence).

[5] Since the plaintiff was unable to repay the loans in the total sum of RM1,630,500, the first defendant had on 7 July 2009 proceeded to transfer the said property into its own name pursuant to cl 15(a) read with cll 10 and 14(a) of the loan agreement. It was duly registered in the plaintiff's name. This said property was subsequently sold to the third defendant on 28 September 2010 for a consideration of RM2m. The third defendant had obtained a loan to finance the purchase from the fourth defendant and the title of the said property was consequently charged to the fourth defendant.

[6] Before filing this action on 25 February 2010, the plaintiff had lodged two police reports dated 13 January 2010 and 4 February 2010 (B pp 131 and 133–140) alleging illegal and/or fraudulent moneylending by the first defendant and had applied to enter a caveat on the title of the said property. The second defendant as general manager of the first defendant had subsequently lodged a police report on 7 April 2010 to justify the acquisition of the said property. The plaintiff filed this suit and sought declaration that the loan agreement and supplemental loan agreement dated 5 October 2007 and 29 October 2007 are null and void and of no effect, a declaration that the registration of the transfer of title of the said property to the first defendant is null and void, the refund of interest paid to the first and/or second defendant, injunction restraining the first defendant and/or second defendant, their agents and/or servants from selling and/or pledging and /or charging the said property; damages; costs; inter alia.

THE ISSUES

[7] The broad issues before this court which call for determination are as submitted by learned counsel for the plaintiff as follows:

(a) whether the transactions vide the loan agreement dated 5 October 2007 and the supplemental loan agreement dated 29 October 2007 leading to the transfer of the title of the said property to the first defendant on 7 July 2009 vide Memorial No 30353007 is tainted with illegality and/or fraud and/or breach of contract; and

(b) if it is, whether the transfer of the said property by the first defendant to the third defendant on 28 September 2010 vide Memorial No MC 1009100354 and the charge created by the third defendant in favour of the fourth defendant and registered on the same date vide Memorial No 1009100355 is thereby defeated and liable to be set aside.

[8] In considering the second issue above, the issue involving the third defendant and fourth defendant as submitted by learned counsel for the fourth defendant namely:

(a) whether the first defendant had colluded with the third defendant to fraudulently or illegally cause the fourth defendant to enter a charge over the said property; and

(b) whether the fourth defendant is bona fide chargee for value without notice when it entered a charge over the said property,

will be considered therein as they are similar in substance.

EVALUATION AND FINDINGS

First issue

Illegality and/or fraud and/or breach of contract

[9] The undisputed fact of this case is that the plaintiff had entered into two loan agreements with the first defendant, a licensed moneylender for a loan of RM1,124,00 and RM240,500 respectively which were granted by the first defendant to the plaintiff on 5 October 2007 and 29 October 2007 vide a loan agreement and a supplemental loan agreement dated with the respective dates above. To secure these loans, the plaintiff had pledged its title to the said property as security together with a memorandum of transfer ('MOT') signed in escrow in favour of the first defendant besides the two directors of the plaintiff having also provided letters of guarantees to guarantee repayment of the said loans.

[10] The other undisputed fact is that the first defendant had on 7 July 2009 transferred the said property into its own name which was duly registered in the title vide Memorial No 30353007. The said property was subsequently transferred to the name of the third defendant which was registered vide Memorial No MC 1009100354 on 8 September 2010 and that a charge was created in favour of the fourth defendant as a consequence of the banking financing granted by the fourth defendant to the third defendant for acquiring the said property and it was duly registered on 28 September 2010 vide Memorial No MC 1009100355.

[11] Various grounds have been raised in submission by the plaintiff to contend on the issue of illegality and/or fraud and/or breach of contract in respect of the moneylending transactions herein. On the question of the illegality, the law is clear that if the court is satisfied that the transaction is indeed illegal, the court is obliged to act on it, see *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; [1996] 3 CLJ 494 (CA); *Siew Kwang Joon &*

Anor v Asia Commercial Finance (M) Bhd [1996] 3 MLJ 641. Illegality needs not the specifically pleaded; *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2010] 1 AMR 501.

[12] At the onset, on the standard of proof for fraud in civil proceedings, the current law has propounded the standard to be proof beyond reasonable doubt as can be seen in the Federal Court cases of *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 and *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 AMR 329 which have clearly departed from the earlier authority of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personnel representative of the estate of Chan Weng Sun, deceased)* [1997] 2 MLJ 45 as cited by learned counsel for the plaintiff. By the doctrine of judicial precedent, the later decision of the Federal Court should be adopted as the applicable principle of law. It is also apt to note what constitutes fraud to determine the first issue raised. In *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* [1980] 2 MLJ 136 at p 138 (FC), Raja Azlan Shah CJ Malaya (as His Royal Highness then was) states:

> Whether fraud exists is a question of fact, to the decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean 'actual fraud, ie dishonesty of some sort' for which the registered proprietor is a party or privy. 'Fraud is same in all courts, but such expressions as 'constructive fraud' are … inaccurate'; that 'fraud' implies a wilful act, on the part of one whereby another is sought to be deprived, by justifiable means, of what he is entitled' (per Romilly MR in *Green v Nixon*). Thus, in *Waimiha Sawnmilling Co Ltd v Waione Timber Co Ltd*, it was said that 'if the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent …

[13] The principal contentions raised by the plaintiff on the issue of illegality are basically on the breach of the Moneylenders Ordinance (Sabah Cap 81) and/or the Moneylenders Act 1951 which was effective in Sabah on 1 January 2008 vide the States of Sabah and Sarawak (Extension and Modification of the Moneylenders Act 1951) Order 2007, PU(A) 414/2007. Prior to this date, the Moneylenders Ordinance (Sabah Cap 81) was applicable. It is a fact that at the time of the loans transaction on 5 October 2007 and 29 October 2007, the Moneylenders Act 1951 had not been extended to Sabah and the Moneylenders Ordinance (Sabah Cap 81) shall be the operative law to govern these loans granted by the first defendant to the plaintiff. This Ordinance provided, inter alia, that the moneylenders shall be licenced; licences shall be issued quarterly; acknowledgement in writing made for a loan shall be stamped or made in the presence of a magistrate if the borrower was unable to read or write English; interest chargeable shall not exceed 15% per year for secured loan and moneylenders shall keep a register showing the identity of the borrower, the amount borrowed, rate of interest and the security and such register shall be produced for the inspection of the magistrate on demand.

From the facts of this case, there is no dispute that the first defendant was not so licensed nor the fact that the loan agreement and supplement were properly stamped. The fact that the licence at bundle C p 12 shows that the validity of the licence was for the duration from 1 January 2007–31 December 2007 of one year and not quarterly as in s 5 of the Moneylenders Ordinance (Sabah Cap 81) should not be construed as the fault of the first defendant being the licensee as it was the role of the issuing authority to issue the licence and for the duration as provided by the law. From the licence itself; it was apparently issued under r 5 Second Schedule of the Moneylenders Ordinance (Sabah Cap 81). If plaintiff alleged a breach, it has the burden to prove by calling the issuing authority. Ex facie, the court must accept the licence as valid unless proved otherwise.

[14] The second pertinent ingredient of such a transaction is the rate of interest. The loan agreement as well as the supplemental loan agreement clearly stipulated the interest chargeable at 1.25% per month which is 15%pa which was the permissible rate under s 7 of the Ordinance for a secured loan. I do not find any infringement of the Ordinance relating to the interest rate.

[15] On whether the first defendant could take security for the loans, s 7 of the Ordinance which spoke of the different interest rate chargeable for secured and unsecured loans implies that the moneylenders could take security but the interest rate chargeable per annum was lower than loans 'on note of hand only' which could mean unsecured loan where parties had only signed on a document. Even if such is not implied from s 7, I do not think that the parties herein could not covenant to have security for the loan when the Ordinance did not forbid it. It would not have violated s 7 so long as the interest rate charged did not exceed the 15%pa if the loans were secured.

[16] The plaintiff also referred to s 8(1) of the Ordinance to contend that the first defendant had failed to produce the register to prove the loans. Such contention of failure to produce cannot be equated to non-compliance with s 8(1) which is to keep a register bearing in mind that it shall only be produced for inspection on demand. Learned counsel for the first and second defendant contended that this issue was not pleaded and the defendants were not obliged since the defendants were relying on the statement of account which plaintiff had confirmed and accepted. Undoubtedly, for illegality, there is no necessity to plead in the pleadings but if the plaintiff wanted the document of register to be produced it is incumbent to serve on the first defendant a notice to produce or to ask the second defendant who testified as a witness as the general manager of the first defendant to produce it in court. Without having so demanded, it would not be tenable to contend that s 114(g) of the Evidence Act 1950 should be invoked where there is no withholding or suppression of evidence. There was no question of illegality when the register was not before the court as the

first defendant was not asked to produce. Section 114(g) is applicable where there is wilful withholding or suppression of important and material evidence and not merely on account of the non production of the evidence; see *Sarkar's Law of Evidence* (15th Ed), 1997 Vol 2 p 1678. If the second defendant was asked to produce or a notice was served to produce and yet the defendants failed to do so without valid ground, only then can it be said to have wilfully withheld or suppressed such material evidence. On this point, I do not find any contravention of the Moneylenders Ordinance herein. On the evidence as a whole, I do not find that the loan agreement and supplemental loan agreement have in whatever way contravened the Moneylenders Ordinance (Sabah Cap 81) to be construed as being illegal.

[17] Fraud as found by the Federal Court in *PJTV Denson (M) Sdn Bhd & Ors v Roxy (Malaysia) Sdn Bhd* must be actual fraud in the sense that there is dishonest and/or a wilful act to deprive another by unjustifiable means of what he is entitled or to cheat a man of a known exiting right. The plaintiff having signed the loan agreement and supplemental loan agreement for the respective loans and having agreed to hand in the original title of the said property coupled with the MOT duly executed in escrow in favour of the first defendant as security for the loans, knew very well that in the event the plaintiff failed to repay the loans and interest thereof as covenanted in the two agreements, this security would be forfeited and the title would be transferred into the name of the first defendant. This is as provided in cl 15(a) of the loan agreement. It is undoubted from the evidence that plaintiff could not repay the loan and as a consequence of which the first defendant exercised the right under the said agreement and transferred the land into its name on 7 July 2009. The plaintiff contended that the first defendant was contractually required to issue a notice to the plaintiff to remedy any breach or default within seven days from the date of the notice pursuant to cl 15(a) and since no notice was given to the plaintiff, the first defendant's transfer of the said property to itself is as contended fraudulence. The first and second defendants contended that reading cll 10, 14(a) and 15(a) together, there is no requirement of a notice in writing to be given to the plaintiff.

[18] Clause 10 provides:

> 10. The Borrower hereby covenants and agrees with the company to repay the loan and all such sums of money which shall at any time hereafter be due and owing by the Borrower of the company within six (6) months from the date of release of the loan unless extended by the company on such terms and conditions as it shall deem fit.

[19] Clause 14(a)–(b) states:

14 The Borrower is deemed to have committed a default if the Borrower commits or threatens to commit a breach of any of the covenants, undertaking, stipulations, terms, conditions or provisions herein stipulated and without prejudice to the generality of the foregoing, upon the happening of any one or more of the following events;

(a) if the Borrower fails or defaults in the payment of such sum of money whatsoever and however payable on its due date by virtue of the provisions herein contained whether formally demanded or not; or

(b) if the Borrower fails to comply with any notice given under this Agreement requiring them to remedy any breach of the terms of this Agreement within the time stipulated therefore; or

[20] Clause 15(a) provides:

15 If a breach of clause 10 hereof by the Borrower and/or its directors shall happen or a default pursuant to clause 14 hereof shall happen and which is capable of remedy is not remedied within a period of seven (7) days from the date of notice by the Company requesting remedy of the same, or is not remedied within the time specifically stipulated therefore (if any) in request of the event in question, the indebtedness and all other sums payable under this Agreement shall become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and wherefore the company shall be entitled forthwith to:

(a) to forfeit and transfer the said Property into the name of the Company or its nominees and the Borrower shall not be entitled to dispute the ownership of the said Property so transferred;

…

[21] From the words in cl 14 'upon the happening of any one or more of the following events' and the events as listed in paras (a)–(m) to cl 14 which are joined by conjunction 'or' and not 'and', it must be construed that the events in (a)–(m) above are distinct and separate from one another. Hence the notice as mentioned in cl 14(b) is distinct by itself and such notice is not required for any of the other events in cl 14(a)–(m) except para (b). Thus, the notice referred to in cl 15 is the notice referred to in cl 14(b) and does not mean in the general sense that notices must be given for all defaults in cl 14(a), (c)–(m) but is confined to cl 14(b) only. I therefore agree with the first and second defendants' submission that there is no requirement of notice to be issued to the plaintiff to remedy the breach of cll 10 and/or 14(a) read with cl 15(a) of the loan agreement. I do not find any fraud as submitted. Similarly, I do not find any breach of the loan contracts when the first defendant did not issue any written notice to the plaintiff to remedy the default in repayment of the loans as it was not so covenanted.

[22] As to the allegation of fraudulent moneylending transaction, the first and second defendants submitted that throughout the whole transaction from the time of signing of the loan agreement and supplemental loan agreement ie from 5 October 2007–7 July 2009 when the said property was transferred into the name of the first plaintiff of more than 21 months, the plaintiff had never alleged that the transaction was fraudulent. The plaintiff's first police report was only lodged on 13 January 2010 shortly prior to the filing of this suit. In addition, it was submitted that the plaintiff had all along wanted to settle the loans to the first defendant by obtaining overdraft facility ('OD') and term loan in the sum of RM800,000 and RM1m respectively from Maybank. From the correspondence in bundle C pp 33–38, the plaintiff had sought the said OD and term loan from Maybank through another company known as Syarikat Perniagaan Kasuh owned by the same two directors of the plaintiff.

[23] Irrevocable letter of authorisation dated 3 December 2008 was given to Maybank to pay the first defendant the sum of RM1,630,500 upon the release of the loan facilities of RM1.8m (C p 34) for which Maybank had agreed to withhold the same sum of RM1,630,500 and to honour the cheque in this sum payable to the first defendant and confirmed same to the first defendant (C pp 35–37). However, Maybank retracted its letters dated 16–17 December 2008 for reason that it was not in accordance with the purpose of the term loan and OD granted. The plaintiff had also obtained an offer of credit facilities in the sum of RM2,160 from Alliance Bank dated 26 November 2009 to attempt to recover the said property. There was not at anytime raised the allegation of fraud in the loan agreement and supplemental loan agreement. The conduct of the plaintiff in seeking indulgence from the first defendant to extend time of four months to make payment (C p 33) and to seek banking facilities to settle the sum of RM1,630,500 which is the sum as stated in the first defendant's statement of account to the plaintiff for which the plaintiff confirmed and accepted, shows unequivocally that the plaintiff had accepted the sum due and owing to the first defendant and had made effort to pay the same to the extent of giving irrevocable instruction to Maybank to honour the cheque in the same sum in favour of the first defendant upon the release of the facilities granted. I agree with the submission by the first and second defendants that such allegation of fraud in the loan transaction by the plaintiff is inconsistent with the plaintiff's conduct and is indeed an afterthought. It is conceivable that if the transaction was fraudulent, the plaintiff could not and would not have so acted in the manner it did. I find that plaintiff cannot affirm the contract by accepting and receiving the loans and now seeking to avoid the contract by alleging fraud of no notice being issued to plaintff. In *Fauziah Holdings Sdn Bhd v Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) and another appeal* [2006] 1 MLJ 505 at p 515 (CA), Gopal Sri Ram JCA (as His Lordship then was) said:

> … the right to avoid a transaction carries with it some limitations. You cannot affirm so much of a transaction as benefits you and seek to avoid that part of it that imposes a burden. You cannot pick and choose. You must either affirm the whole transaction or avoid the whole of it. There is no half way house What the defendant is seeking to do here is to avoid selected parts of the transaction. It is seeking to approbate and reprobate. It cannot do that.

In *Verachures Cuameries v Hull & Netherlands Steamship Co Ltd* [1921] 2 KB 608, Scrutton LJ said:

> A person cannot say at one time that a transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

[24] The allegation of fraud some four years after having enjoyed the loans without a word of disgruntlement is a clear attempt to reprobate. The plaintiff cannot be allowed to approbate and reprobate. On the evidence before this court, I find that the plaintiff has failed to prove fraud beyond any reasonable doubt as the first defendant did not forfeit and transfer the said property immediately upon the expiry of the six months repayment period pursuant to cl 10 but had given plaintiff time and the full opportunity to obtain banking facilities to repay the loan and it was upon the plaintiff's failure to do so of about 21 months later that first defendant exercised its contractual right under cl 15(a). From the facts and evidence, I find no evidence of any dishonesty or deceit on the part of the first defendant to deprive the plaintiff wilfully of its property to constitute fraud as alleged.

[25] Pertaining to the allegation of breach of contract, the plaintiff submitted that for secured loan transaction after the coming into force of the Moneylenders Act 1951 and the Moneylenders (Control and Licensing) Regulations 2003 effective from 1 January 2008, it was incumbent on the first defendant to deal with the said property under O 83 of the Rules of the High Court ('RHC') 1980 as stipulated in reg 10 read with Schedule K cl (4)(a), failing which the first defendant is deemed to have committed an offence under the Moneylenders Act 1951 and punishable under s 10P(2) thereof. Hence, it was contended that the transfer of the said property by the first plaintiff on 7 July 2009 is ex facie illegal under s 24(a) of the Contracts Act 1950 read with s 2(g) of the same Act since such transfer is forbidden by reg 10(1) of the Moneylenders (Control and Licensing) Regulations 2003 read with Schedule K cl 5(4)(a) thereof citing in support the Federal Court case of *Sabahbumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356. I shall deal with this point later.

[26] The plaintiff has also contended that the loan and additional loan were not released by the first defendant to the plaintiff but that it was DW1 (the second defendant) who had released the total sums of RM817,880 from his personal funds to the directors of the plaintiff. I pause to say that I am inclined to agree with the first and second defendants' submission that this question of release of loans is non-issue. The plaintiff by its director PW1 had duly signed on the statement of account dated 20 December 2008 to confirm and accept to be correct the account which showed the payments of the sum in the loan agreement and supplemental loan agreement had been disbursed to the plaintiff. Such affirmation of the statement of account can be construed as an admission of not only the sums of money having been received by the plaintiff but also the accuracy as to the amount therein pursuant to s 18(3)(a) of the Evidence Act 1950 which provides that statements made by persons who have any proprietary or pecuniary interest in the subject matter of the proceeding, and who make the statement in their character of persons so interested are admissions if they are made during the continuance of the interest of the persons making the statements. In *Ranhill Bersekutu Sdn Bhd v Konsortium Lapangan Terjaya Sdn Bhd* [2001] MLJU 3; [2001] 2 CLJ 380, it was held that the admission under s 18 of the Evidence Act 1950 are conclusive evidence and admissible to negate the element of dispute. In *Pembinaan KSY Sdn Bhd v Syarikat Federal Furniture Construction and Engineering works* [1991] 1 MLJ 347 at p 348, the Supreme Court held that an admission of facts made by way of 'letter' was sufficient to show that the defendant has no defence. It is undoubted that the payments made by DW1 in the capacity as general manager of the first defendant were pursuant to the said loan agreement and supplemental loan agreement and must be accepted to be from the first defendant as they were so recorded in the statement of account of the first defendant. Looking at the Moneylenders Ordinance (Sabah Cap 81) then enforced, there is no provision which required that the loan money must be disbursed directly from the first defendant to the plaintiff and that it could not be by or through the agent or servant. Since there was no specific requirement at the material time, it is misconceived to construe or to imply such a legal requirement. If the plaintiff is disputing the account, the plaintiff could have in the first instance done so when they received the statement of account dated 20 December 2008 or alternatively to have asked for the detailed account from the first defendant. The plaintiff obviously did not but happily endorsed it by signing on the statement of account. During trial, DW1 was also not asked to produce the detail account pertaining to these two loan transactions nor did the plaintiff tender to court a proper account of its own to illustrate the sums received, any repayment made, the interest paid, payment for legal fees, expense and etc. In the circumstances the onus of proof does not shift to the first defendant to produce the detail account which was not asked of it through DW1 (*International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86 (FC)). In addition if the loans were not disbursed or that if there were short of the sums borrowed, it is only sensible that the plaintiff would have raised them at the

relevant time and not only four years after the loans. Again, if the loans were not disbursed, why would the two directors of the plaintiff provided letters of guarantee to guarantee repayment of the said respective sums of the loan. Clause 19 of loan agreement provided that the parties agreed and covenanted that statement of account in writing showing the indebtedness of the plaintiff duly certified by an authorised officer of the first defendant shall be binding and conclusive evidence against the plaintiff in a court of law. With the plaintiff having affirmed and admitted the statement of account dated 20 December 2008, the contention by the plaintiff that the loans were not released to the plaintiff or that only RM817,800 was released ought to be rejected.

[27] On the allegation of the excessive interest charged at 8% per month, in the absence of a proper and/or detail account to show such interest rate had been charged on the plaintiff who bears the burden to prove such allegation, this court is unabled to come to any finding of facts that such rate was charged bearing in mind that there was no clear or actual evidence to show that the payments made by the plaintiff were towards settlement of the principal and/or interest or whether they were only interest payment and if so, for what period or accumulated periods of time and others. Evidence must be clear and cogent but not mere suspicion or conjectures. On a balance of probabilities, I have to find that such allegation was not proved by the plaintiff.

[28] As to the relief under s 66 of the Contracts Act 1950, I agree with the first defendant's submission that this is a non-issue as it was not so pleaded. Moreover the first defendant had not made any counterclaim against the plaintiff for any relief under s 66 of the Contracts Act 1950.

[29] Reverting to the issue of illegality of the two loans on the allegation by the plaintiff on ground of the failure of the first defendant to enforce the security under O 83 of the RHC as stipulated in reg 10 read with Schedule K cl (4)(a) therein which is the statutory prescribed form of loan agreement for moneylenders and hence the transfer of the said property is ex facie illegal under s 24(a) of the Contracts Act 1950 as it is forbidden by law, my first note is that the loan agreement and supplemental loan agreement were not in the prescribed form of the statutory Moneylending Agreement (secured loan) as in Schedule K pursuant to reg 10(1) but that they were executed under the applicable law at the material time ie the Moneylenders Ordinance Sabah (Cap 81) then without the existence of such agreement as in Schedule K. Clause 5(4)(a) was also not in existence to bind the parties. Similarly, there could not have been cl 3 as in Schedule K pertaining to security lodged as specified in s 11 of the First Schedule of the Moneylenders Act 1951. The Moneylenders Ordinance Sabah (Cap 81) was only repealed by the Moneylenders (Amendment) Act 2011 (PU(B)174/2011) effective from 15 April 2011 which renders the Moneylenders Act 1951 to be applicable to whole Malaysia with

effect from 15 April 2011. The Moneylenders Act did not invalidate or annul the moneylending contracts or transactions prior to the Moneylenders Ordinance Sabah Cap 81 being repealed. In short, prior to 15 April 2011, transactions entered pursuant to the Moneylenders Ordinance Sabah Cap 81 would still be valid and enforceable unless specifically annulled by the Moneylenders Act 1951 which however did not. The States of Sabah and Sarawak (Extension and Modification of the Moneylenders Act 1951) Order 2007 (PU(A) 414/2007) which rendered the Moneylenders Act 1951 effective in Sabah on 1 January 2008 similarly did not invalidate or annul all moneylenders transactions under the Moneylenders Ordinance Sabah Cap 81.

[30] On the requirement to deal with security which is immoveable property under O 83 of the RHC pursuant to Schedule K cl 5(4)(a) of reg 10(1) Moneylenders (Control and Licensing) Regulations 2003 under the Moneylenders Act 1951, it must be noted that this is an agreed term in the prescribed moneylending agreement (secured loan) in Schedule K. The parties herein did not enter into such an agreement in Schedule K nor did they agree on such term as cl 5(4)(a) above. Since Schedule K is an agreement, it will only be valid and enforceable provided parties have been ad idem or agreed and signed on it; otherwise, the validity and enforcibility does not arise. It is an undenied fact that Schedule K did not exist when the parties herein executed the loan agreement and supplemental loan agreement. They had not signed on such presecribed agreement nor agreed to such prescribed term as to enforce the immovable security as a charge action under O 83 of the RHC which had not been introduced in Sabah. I do not think that parties must comply with a term of such agreement for which they had never endorsed or agreed and covenanted nor that it is the intention of the Legislature to compel parties to abide by a term of a contract for which they had never agreed upon and covenanted at the time of the execution of the contracts. I agree with the defendant's submission that the Moneylenders Act and Regulations did not substitute all moneylending agreements then in existence with Schedule K agreement and that first defendant's contractual right which it acquired on 5 October 2007 was never affected by the Act and the Regulations when the first defendant exercised its right pursuant to cl 15(a) of the said loan agreement to transfer the said property into its own name on 7 July 2009. I find it clear that s 30(1) of the Interpretation Act 1948 which provides that 'The repeal of a written law in whole or in part shall not (a) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law'; see also the cited case of *Syed Ibrahim bin Syed Mohd & Ors v Esso Production Malaysia Incorporated* [2004] 2 MLJ 49; [2004] 1 CLJ 889. The Extension Order rendering Moneylenders Act 1951 effective in Sabah commencing from 1 January 2008 also did not provide with retrospective effect. It is therefore clear that the legislation did not intend such effect and it should remain so; see the cited cases of *RHB Bank Bhd v Ya'akob bin Mohd Khalib @ Abdul Ghani bin Muhammed* [2008] 1 MLJ 157 (CA). As to the provisions of s 46(5) and 46(7)

of the Moneylenders (Amendment) Act 2003 as submitted by the plaintiff, I agree with the submission by the fourth defendant that these provisions do not apply to the Sabah Moneylenders Ordinance but to the 'Principal Act' which is the Moneylenders Act 1951 as can be seen in s 46(1), (3), (5), (7) and (9) which make express reference to the 'Principal Act' while sub-s (5)(a)–(b) categorically provide, inter alia, that 'the Principal Act as amended by this Act'. The State of Sabah and Sarawak (Extension of Modification of the Moneylenders Act 1951) Order 2007 has provided in s 5 as to repeal, transitional and savings clause for the transition of the Sabah Moneylenders Ordinance to the Moneylenders Act 1951 but there is no modification of s 46 of the Amendment Act 2003 to include the Sabah Moneylenders Ordinance under the First Schedule of this Extension Order 2007. Order 83 of the RHC applies to a charge action which includes a legal and equitable charge. The plaintiff had accepted the fact that there was no legal charge when the question was put to DW1 (the second defendant) during cross-examination (line 1023–1024 NOP) and DW1 agreed that there was no legal charge of the said property. There was also no issue to suggest that there was an equitable charge if no charge was registered. Order 83 r 1 of the RHC which expressly provides that the action is by a chargee or a chargor or any person having the right to foreclose or redeem any charge, does not seem to be applicable to a security which is not a charge whether legal or equitable. The first defendant could not have enforced the security pledged by the plaintiff vide contract under O 83 of the RHC when there was no charge in law pursuant to O 83 of the RHC.

[31] Having considered this issue in its totality, I hold the view that O 83 of the RHC which relates to the enforcement of a charge pertaining to moneylending must arise from the statutorily prescribed moneylending agreement as provided in Schedule K of the said reg 10(1) and the Moneylenders Act 1951 but it was inapplicable to the moneylending agreement entered pursuant to the Moneylenders Ordinance Sabah (Cap 81) prior to the coming into force of the Moneylenders Act 1951 in Sabah. Consequently, any failure to comply with O 83 of the RHC in the instant case does not affect the validity of the said agreement and supplemental agreement nor the transfer of the security arising from the failure of the plaintiff to repay the loans as contractually agreed and covenanted vide the said agreements. I do not find any question of illegality in this respect to affect the transactions and the transfer of the said property herein.

Second issue

Transfer of the said property by the first defendant to the third defendant

[32] On the second issue, in view of the findings as deliberated above, having had the title of the said property transferred to it from the MOT in escrow

executed by the plaintiff in favour of the first defendant upon the plaintiff having defaulted in the repayment of the said loans and interest thereon pursuant to the terms and conditions of the said agreements, the first defendant must be construed to have acquired good title to the said property. Therefore, the first defendant was entitled to deal with the property as the registered proprietor and could undoubtedly sell the said property to any third party. The plaintiff attempted to impute fraud by alleging that the first defendant had sold the said property to the third defendant whom plaintiff alleged was a nominee of the first defendant. I do not find from the facts in the instant case of any fraud being proved by the plaintiff for reasons that evidence shows clearly that third defendant had taken a loan to finance the purchase of the said property and a proper legal charge had been executed in favour of the fourth defendant bank which granted that financial facility to the third defendant. Valuation report also shows that the sale and purchase price of the said property was in accordance with market value prevailing at the material time; it was not sold at under value. I find no valid reason to impute or infer any impropriety in such sale and purchase least to mention any fraud which must be actual fraud to be proved beyond reasonable doubt. On the evidence as adduced before the court, I do not find any evidence that the first defendant had in whatever way colluded with the third defendant in the said sale and purchase between them or in any way fraudulently and illegally caused the fourth defendant to enter a charge over said property. I find that the legal charge was entered by the fourth defendant because the fourth defendant bank had granted a loan to the third defendant to finance payment towards the purchase price of the said property. The legal charge appeared as a matter of course to secure the loan duly granted. The fact that the fourth defendant's manager did not perhaps make certain inquiries only goes to the risk that the bank may have to undertake but it does not affect the legal charge that it had entered to secure the loan granted to third defendant for the purchase of the said property. From the evidence, I do not find any impropriety to constitute fraud in the said sale and purchase and the charge lodged in respect of the title of the said property by the fourth defendant.

A B C D E F G H I

CONCLUSION

[33] Having considered the evidence as a whole and for the foregoing reasons, I hold that the plaintiff had failed to prove its case against the first, second and fourth defendant as pleaded and consequently, the plaintiff's claims against the first, second and fourth defendants is dismissed with costs of RM15,000 to the first and second defendants and RM10,000 to the fourth defendant.

[34] The third defendant was absent throughout the trial. In *Takako Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381 the Federal

Court laid down the principle that the absent defendant ought to be deemed to have accepted the plaintiff's case as true and that an adverse inference is to be drawn for his failure to testify. However, in a case where the plaintiff is found not to have proved its case in accordance with the burden of proof as well as the standard of proof as required, an absent defendant cannot be said to have accepted the plaintiff's case as proved and true. Since from the evidence of this instant case that this court has found no evidence to prove fraud or collusion or the like between the first defendant and/or second defendant and the third defendant and/or the fourth defendant which are closely knitted, there could not be a presumption that the third defendant must be deemed to have accepted the existence of fraud or the like which had not been proved. In the circumstances, I find that the principles in *Takako Sakao v Ng Pek Yuen & Anor* does not apply to the third defendant when the plaintiff had not proved its case primarily. For that reason I must hold that the plaintiff had similarly failed to prove its case against the third defendant and consequently, the plaintiff's case against the third defendant is also dismissed but with no order as to costs since the third defendant had not appeared to defend himself and would not have incurred any costs.

Plaintiff's claim against defendants dismissed with costs of RM15,000 to first and second defendants and RM10,000 to fourth defendant.

Reported by Kohila Nesan